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No. 84-648 and No. 84-657

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-648

SEDIMA, S.P.R.L.,
Petitioner,

- v. -

IMREX COMPANY, INC., et al.,
Respondents.

No. 84-657

BANKERS TRUST COMPANY,
Petitioner,

- v. -

DANIEL RHOADES, et al.,
Respondents.

BRIEF OF AMICUS CURIAE THE CITY OF NEW YORK

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17 pp

TABLE OF CONTENTS

	Page
Table of Contents.....	i
Table of Authorities.....	ii
Interest of Amicus Curiae.....	1
Reasons For Granting The Writs.....	7
Conclusion.....	12

TABLE OF AUTHORITIES

Cases:	Page
Alcorn County v. U.S. Interstate Supplies Inc., 731 F.2d 1160 (5th Cir.1984)	5
Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984)	passim
City of Milwaukee v. Hansen, Civ. No. 77-246 (E.D.Wis. Jan. 13, 1981)	6,11
City of New York v. Arnmart Wholesale Beer Distributors, Inc., 83 Civ. 9263 (S.D.N.Y., filed Dec.21, 1983)	5,8
City of New York v. Bandolene Fuels, Inc., 81 Civ. 1240 (E.D.N.Y., filed April 24,1981)	6
City of New York v. Sitzer, 81 Civ. 7116 (S.D.N.Y., filed November 16,1981)	6
County of Cook v. Lynch, 560 F. Supp. 136 (N.D. Ill. 1982)	5
County of Suffolk v. Walsh, 81 Civ. 0257 (E.D.N.Y., filed Jan. 27, 1981)	5

Cases: Page

Gerace v. Utica Veal Co., 580 F. Supp. 1465 (N.D.N.Y. 1984)..... 5

Maryland v. Buzz Berg Wrecking Co., 496 F. Supp. 245 (D.Md. 1980)..... 5

Moore v. Margiotta, 83 Civ. 2036 (E.D.N.Y., filed May 19, 1983)..... 5

Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633 (D.Alaska 1982)..... 5

New York v. O'Hara, 83 Civ. 1440 (W.D.N.Y.,filed December 21, 1983..... 5

Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984)..... passim

Statutes:

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.§§ 1961-1968..... passim

New York City Charter, Ch. 16, §394..... 2

Other Authorities: Page

Note, Government Corruption and Civil RICO: Providing Compensation for Intangible Losses, 58 N.Y.U. L. Rev. 1530 (1983)..... 4

Tannenbaum & Molo, State and Local Governments' Use of the Treble Damages Remedy Under Civil RICO: A Means of Redressing The Economic Effects of Unlawful Conduct, 35 Baylor L. Rev. 1 (1983)..... 4

116 Cong. Rec. 35,343 (1970)..... 9

116 Cong. Rec. 35,344 (1970)..... 9

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BRIEF OF AMICUS CURIAE THE CITY OF NEW YORK

INTEREST OF AMICUS CURIAE

The City of New York ("City") submits this amicus curiae brief in support of the petitions for

writs of certiorari to the United States Court of Appeals for the Second Circuit.* The decisions of the Second Circuit in Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (1984) and Bankers Trust Co. v. Rhoades, 741 F.2d 511 (1984), threaten the vitality and effectiveness of a statutory remedy used by the City and other local or state governments to combat systematic fraud and governmental corruption.

The New York City Charter charges the City with the responsibility of representing and protecting the public interest and the rights of its citizens. New York City Charter, Ch. 16, § 394. The City is also charged with the institutional responsibility of protecting its capability for delivering honest, efficient, impartial and effective governmental services to all its citizens. Id.

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*A third, recently-filed petition for a writ of certiorari to the Second Circuit, Joel, et al. v. Cirrito, et al., No. 84-604, raises some of the same issues as those herein. The City supports the issuance of a writ in that case for the same reasons stated herein.

In fulfilling its obligations, the City, as well as other localities, must confront the persistent challenges and dangers, as well as the corrupting influence posed by systematic criminal frauds. Tax evasion or public contractor frauds cause massive economic loss to the City. Bribery and kickback schemes injure the public fisc and impair the integrity of government. Public benefits programs are repeatedly targeted by malefactors who defraud the government and the intended beneficiaries. Organized drug trafficking and arson for profit schemes create extraordinary demands on police and other governmental services and diminish the quality of life in the City.

These criminal activities are often accomplished through sophisticated means, by criminal enterprises which systematically commit multiple criminal acts. Ordinary civil and criminal remedies available to penalize specific criminal acts and offer recompense to the City are insufficient to

eradicate the widespread problems caused by the systematic misconduct of criminal enterprises. Extraordinary remedies are needed to eradicate these widespread problems.

The City has found that the civil remedy provision in the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO") is an effective weapon for combatting these various criminal schemes and protecting the public interest, the public fisc and the institutions of local government.* Specifically, the City has employed the civil remedy provision in RICO to attack fraudulent tax evasion and illegal bidding

*The City's view is shared by commentators. See Note, Government Corruption and Civil RICO: Providing Compensation for Intangible Losses, 58 N.Y.U. L. Rev. 1530 (1983); Tannenbaum & Molo, State and Local Governments' Use of the Treble Damages Remedy Under Civil RICO: A Means of Redressing The Economic Effects of Unlawful Conduct, 35 Baylor L. Rev. 1 (1983).

schemes.* In City of New York v. Arnmart Wholesale Beer Distributors, Inc., 83 Civ. 9263 (S.D.N.Y., filed Dec. 21, 1983) the City sued eleven beer distributors and their principal officers for

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*Civil RICO actions have also been employed by or on behalf of state or other local governments to recover the loss flowing from complex and far-reaching frauds, often accompanied by bribery or some other form of corruption. See New York v. O'Hara, 83 Civ. 1440 (W.D.N.Y., filed December 21, 1983) (bribery and overcharges in connection with toxic waste disposal contract); County of Suffolk v. Walsh, 81 Civ. 0257 (E.D.N.Y., filed Jan. 27, 1981) (bribery and bid rigging in connection with sewer construction project); Moore v. Margiotta, 83 Civ. 2036 (E.D.N.Y., filed May 19, 1983) (taxpayers' civil RICO action arising from political slush fund payoffs, kickbacks, and money laundering scheme); Alcorn County v. U.S. Interstate Supplies Inc., 731 F.2d 1160 (5th Cir. 1984)(bribery and fraudulent billing by office supply company); Gerace v. Utica Veal Co., 580 F. Supp. 1465 (N.D.N.Y. 1984) (fraudulent underreporting by stockyard of weight and grade of ranchers' livestock, causing higher reimbursement payments to ranchers by state); County of Cook v. Lynch, 560 F. Supp. 136 (N.D. Ill. 1982) (bribery in return for real estate tax assessment reductions); Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633 (D. Alaska 1982) (bribery and bid rigging in connection with telephone cable contracts); Maryland v. Buzz Berg Wrecking Co., 496 F. Supp. 245 (D.Md. 1980) (bid rigging and bribery in connection with demolition work for urban renewal project).

their perpetration of an elaborate series of schemes — described in greater detail, infra — to evade the City's beer excise and general corporation taxes. In City of New York v. Sitzer, 81 Civ. 7116 (S.D.N.Y., filed November 16, 1981), the City sued the operators of a group of massage parlors who systematically laundered their revenues, committed bribery and evaded City taxes. In City of New York v. Bandolene Fuels, Inc., 81 Civ. 1240 (E.D.N.Y., filed April 24, 1981) the City sued a fuel oil company and its principal officer for the damages flowing from a fraudulent bidding and overbilling scheme. In addition, the City has explored the possibility of a civil RICO action to recover the losses arising from extraordinary demands on local governmental services and diminution of the quality of life caused by the systematic misconduct of criminal enterprises.*

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*Compare City of Milwaukee v. Hansen, Civ. No. 77-246, slip op. at 3-4 (E.D.Wis. Jan. 13, 1981) (arsonists liable for treble the cost of fighting fires).

REASONS FOR GRANTING THE WRITS

The Second Circuit's decisions in Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (1984) and Bankers Trust Co. v. Rhoades, 741 F.2d 511 (1984) destroy the efficacy of the civil remedy provision in RICO and consequently the ability of local and state governments to vindicate the public interest by means of that statute.

The prior conviction requirement created in Sedima, supra, 741 F.2d at 496-504 — which has absolutely no basis in the statute — makes local and state government civil RICO suits subject both to a prosecutor's prior exercise of discretion to commence a criminal action, and to the prosecutor's prior success in the criminal action. Thus, the prior conviction requirement strips local and state governments of independent use of an effective weapon against corruption, large-scale frauds and other broad-based criminal schemes.

The prior conviction requirement will bar many actions clearly contemplated by Congress when it enacted the civil remedy provision in RICO. For example, in City of New York v. Arnmart Wholesale Beer Distributors, Inc., supra, eleven beer distributing companies evaded excise taxes on wholesale beer purchases in New York City by fraudulently representing sales of beer to be sales of soda; laundering beer sales through fictitious purchasers residing outside the City; engaging in off-the-books cash transactions; filing fraudulent tax returns; and failing to file tax returns. This is the kind of systematic criminal scheme which RICO was designed to eliminate. The City decided to bring a civil RICO treble damages action since treble damages would be most effective as a deterrent and as a means of recovering losses.*

*Referring a case to a criminal prosecutor does not guarantee that there will be a criminal prosecution, since the decision to do so is then within the prosecutor's discretion. Prosecutorial priorities may differ from the City's priorities, and prosecutorial resources are limited.

Because there were no prior convictions, the perpetrators of these schemes will totally escape civil liability under RICO - if the prior conviction requirement created in Sedima is not overruled.

The differing "racketeering injury" requirements in, respectively, Sedima and Bankers Trust, similarly eviscerate the utility of the civil remedy provision in RICO. The "mobster" requirement created in Sedima, supra, 741 F.2d at 494-96 is either so vague or so limited as to impose an insuperable obstacle to success in a civil RICO suit. It is contrary to the express intent of Congress, which feared that such a requirement would create an unconstitutional "status" offense. 116 Cong. Rec. 35,343 (1970). It is also contrary to the spirit, structure and language of the statute, which defined prohibited racketeering activity in terms of conduct rather than association. See 116 Cong. Rec. 35,344 (1970); see generally 18 U.S.C.

§§ 1961-1968. The "distinct RICO injury" requirement created in Bankers Trust, supra, 741 F.2d at 515-18, similarly debilitates the civil remedy provision in RICO, by illogically requiring a differentiation between the injury caused by any one predicate act and the injury caused by the RICO offense.

The Second Circuit's analysis in Bankers Trust of how the civil remedy provision in RICO would apply in a case of arson for profit demonstrates that the "distinct RICO injury" requirement deprives the civil remedy provision in RICO of any practical significance. In Bankers Trust, supra, 741 F.2d at 517, the Second Circuit stated that an example of a "distinct RICO injury" could be found where a victim of multiple arsons was denied fire insurance and thereafter was unable to obtain reimbursement for innocent fire damage (e.g., destruction caused by lightning). In contrast, the Second Circuit seemed to indicate that the

victim of repeated arsons could not sue the arsonist for fire damage directly resulting from fires set by the arsonist. Plainly, such analysis destroys the effectiveness of the civil remedy provision in RICO as a method for combatting crime, and erodes the doctrine established in City of Milwaukee v. Hansen, supra, that the damage directly resulting from arson - in that case, municipal fire-fighting costs - is compensable in a civil RICO suit. Plainly, such analysis undermines the purposes of the civil remedy provision in RICO — augmented compensation to the victim for all of its losses resulting from the criminal scheme, and the economic destruction of the criminal enterprise.

CONCLUSION

For the reasons set forth herein, amicus curiae, The City of New York respectfully urges that the Court grant the petitions for writs of certiorari to review the decisions of the Second Circuit Court of Appeals.

November 21, 1984.

Respectfully submitted,

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